No. 89-1525

In The

Supreme Court of the United States

October Term, 1989

NOBEL-SYSCO FOODS SERVICES CO.,

Petitioner,

v.

WILBUR TOLEDO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer's offer to settle an administrative charge of religious discrimination in hiring constitutes an attempt to accommodate the prospective employee's religious practices.

2. Whether the Court of Appeals erred in imposing Title VII liability upon Petitioner by affirming the District Court's findings that Petitioner did not make any attempt to accommodate Respondent's religious practices before refusing to hire him, and that Petitioner could have accommodated such practices without undue hardship.

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STATUTES AND REGULATIONS INVOLVED: RESPONDENT'S SUPPLEMENT

Relevant portions of the Department of Transportation regulations provide:

49 C.F.R. §391.81(b): This subpart prescribes minimum Federal safety standards to detect and deter the use of controlled substances as defined in 49 CFR Part 40 (marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP)).

49 C.F.R. §40.21: (a) DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines and phencyclidine.

(b) An employer may include in its testing protocols other controlled substances or alcohol only pursuant to a DOT agency approval, if testing for those substances is authorized under agency regulations and if the Department of Health and Human Services has established an approved testing protocol and positive threshold for each such substance.

(c) Urine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations.

STATEMENT OF THE CASE: RESPONDENT'S SUPPLEMENT

Respondent Wilbur Toledo (Toledo) is an enrolled member of the Navajo Tribe of Indians. He has been a member of the Native American Church (Church) since 1983, and has made sacramental use of peyote in Church ceremonies. Such religious use of peyote is legal in the relevant jurisdictions of New Mexico, Colorado, and the Navajo Nation.

By the time of trial in 1986 Toledo had successfully worked for four employers, in various jobs involving heavy equipment operation and truck driving, while an active member of the Church. He has not had an accident of any type while working as a commercial driver, let alone an accident caused by or associated with his participation in Church ceremonies.

Petitioner Nobel-Sysco Foods Services Co., Inc. (Nobel) has provided an incomplete and erroneous description of the actions that culminated in its refusal to hire Toledo to work as a driver. Nobel states that it refused to hire Toledo because it believed that, if it hired Toledo, it would be in violation of regulations of the Department of Transportation, would assume an unacceptable risk of liability, and would face cancellation of its truck lease with Ryder Truck Rental. Pet. for Cert., p. 4. However, only one of these concerns was found by the District Court to have motivated Nobel to refuse to hire Toledo; the District Court found that Nobel decided not to hire Toledo because of the risk of potential tort liability. *Toledo v. Nobel-Sysco, Inc.*, 651 F.Supp. 483, 486 (D.N.M. 1986). The Court of Appeals did not modify this finding. *Toledo*

v. Nobel-Sysco, Inc., 892 F.2d 1481, 1484 (10th Cir. 1989). The remaining concerns set forth by Nobel did not enter into Nobel's refusal to hire Toledo, but were raised in the present litigation to justify that refusal.

The District Court found that Nobel did not offer any accommodation of Toledo's religious practices. *Toledo*, 651 F.Supp. at 486. James Etherton, Nobel's director of personnel, testified that he did not even consider making any type of accommodation of Toledo's practices. (Transcript at 109). After Toledo was told by Rodney Plagmann, the Nobel interviewer, that Nobel would not hire him, Toledo asked Plagmann if he could contest Nobel's refusal to hire him. Plagmann told Toledo to "do whatever you have to." (Transcript at 20).

After Toledo filed his discrimination charge administratively, Nobel made two offers to Toledo through the New Mexico Human Rights Commission that Nobel describes to this Court as "accommodation offers". The second offer, at issue in this litigation, was, like the first offer, not just an accommodation offer but instead an attempt to settle Toledo's pending charge of discrimination. While Nobel informs this Court of the actions that it was committed to take under the terms of the proposed settlement, Nobel's description omits the crucial fact that the settlement proposal required Toledo to dismiss his administrative charge of discrimination. The offer of $500.00 in backpay was a compromise of Toledo's claim for accrued backpay of approximately $4,400.00.

REASONS FOR DENYING THE WRIT

Nobel's arguments before this Court may be reasonably distilled into three subjects. First, Nobel attacks the ruling that a settlement offer made during administrative conciliation does not constitute an "accommodation attempt" under 42 U.S.C. §2000e(j), contending that this ruling amounts to a strict liability standard under Title VII. Pet. for Cert., p. 6. Second, Nobel argues that the Court of Appeals has eliminated the duty of an employee to participate in administrative conciliation. Pet. for Cert., p. 6-7. Third, Nobel assails the Court of Appeals' holding that an employer in a religious discrimination case must either prove that it actually attempted to accommodate a prospective employee's religion, or that it could not make any accommodation without undue hardship. Pet. for Cert., p. 7.

Nobel's predominant points are discussed in detail below. Initially, however, it must be noted that Nobel mischaracterizes the decision of the Court of Appeals. The Court of Appeals did not issue an extraordinary decision or utilize innovative analyses. The decision of the Court of Appeals adheres to Title VII precedent, and is closely tied to the facts that were found by the District Court. The decision does not raise important questions of federal law that require review by this Court.

I. THE COURT OF APPEALS' HOLDING THAT A SETTLEMENT OFFER MADE DURING ADMINISTRATIVE CONCILIATION IS NOT AN ACCOMMODATION ATTEMPT DOES NOT CREATE A STRICT LIABILITY STANDARD.

The Court of Appeals held that Nobel's settlement offer, made to Toledo during administrative conciliation

of his charge of religious discrimination by the New Mexico Human Rights Commission, did not constitute an attempt to reasonably accommodate religion under 42 U.S.C. §2000e(j). *Toledo*, 892 F.2d 1481. The Court of Appeals found that the settlement offer was conditional upon Toledo passing several tests, and upon his dismissing his discrimination charge. The Court of Appeals reversed the District Court's holding that such a settlement offer could "cure" Nobel's discriminatory refusal to hire Toledo. *Toledo*, 892 F.2d at 1488.

Nobel argues that the holding of the Court of Appeals creates a "strict liability" standard for employers under Title VII. Pet. for Cert., p. 6. Nobel's argument is not entirely clear.[1] Nobel appears to be contending that the Court of Appeals has deprived an employer of the opportunity to cure a discriminatory refusal to hire prior to judgment in litigation over that refusal to hire.

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[1] Nobel's use of the term "strict liability" is particularly unusual and confusing. Strict liability is a tort law concept imposing liability when harm is caused by a defective product or by a narrow range of dangerous but socially desirable activities, such as the collection of water on land, blasting, or keeping dangerous animals. In contrast to most forms of tort liability, strict liability may be imposed without a showing of fault in the conduct of the activity that has caused harm. 3 F. Harper, F. James & O. Gray, *The Law of Torts* 184 (2d ed. 1986). Title VII liability is, of course, a form of statutory liability based upon a violation of the terms of the Civil Rights Act of 1964. The tort concept of strict liability has no bearing upon, or place in, an analysis of a Title VII claim. The Court of Appeals did not use, or purport to use, a strict liability analysis in its decision in the present case.

In fact, the Court of Appeals has not deprived employers of techniques for limiting liability. This Court has held that an employer may toll back pay liability by making an unconditional offer of employment. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). An employer may make a victim of discrimination whole, and thus "cure" the discriminatory act, by making not only an unconditional offer of employment but also an offer of accrued backpay and attorney's fees, if incurred. Indeed, Nobel itself recognizes that a victim of discrimination may be made whole through hiring, front and back pay, and attorney's fees. Pet. for Cert., p. 10. Employers have made such "curing" offers in appropriate cases. Nobel is simply wrong when it asserts, Pet. for Cert., p. 8, that a refusal to hire cannot be cured through conciliation by a subsequent offer of employment with backpay.

Nobel errs, therefore, when it argues that liability was found because the Court of Appeals imposed strict, or *per se*, liability upon Nobel. Rather, Nobel faces judgment because it failed to make any effort to accommodate Toledo's religious practices before refusing to hire him, and because it did not prove that accommodation would result in undue hardship. Nobel faces a claim for backpay because it did not act properly to limit its liability under well-established Title VII law.

In particular, the settlement offer made by Nobel to Toledo, through the New Mexico Human Rights Commission, included a promise of an offer of employment that was conditioned upon passing several tests. The settlement offer also proposed that Toledo accept 1/9 of his accrued backpay claim, and required that he dismiss his discrimination charge. As the Court of Appeals observed,

such an offer would not even toll backpay liability, let alone cure Nobel's previous discriminatory refusal to hire. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. at 232 n. 18; *Toledo*, 892 F.2d at 1488.

Thus, the Court of Appeals did not create a strict liability standard for religious discrimination litigation under Title VII. The Court of Appeals simply applied the reasoning in *Ford Motor Co. v. E.E.O.C.* to the facts of this case, which involve an employer's exceptional refusal to make any effort to accommodate the religious practices of a prospective employee until attempting to settle his charge of discrimination. The decision of the Court of Appeals is not in conflict with holdings of other circuits, and does not raise an important question of federal law.

II. THE COURT OF APPEALS' RULING THAT AN EMPLOYER MUST ATTEMPT TO ACCOMODATE RELIGIOUS PRACTICES OR PROVE THAT IT COULD NOT ACCOMODATE WITHOUT UNDUE HARDSHIP DOES NOT CREATE A STRICT LIABILITY STANDARD AND IS CONSISTENT WITH PRECEDENT.

The Court of Appeals ruled that an employer must either prove that it made some effort to accommodate a prospective employee's religion, or that no accommodation could be made without undue hardship. *Toledo*, 892 F.2d at 1490. If the employer is unable to make either of these two showings, then the employer will be found to have breached its statutory duty to accommodate religious practices. *Id.*

Nobel muddles an attack upon this holding with its criticism of the Court of Appeals' ruling that a settlement

offer made during administrative conciliation is not an accommodation attempt. Pet. for Cert., p. 8-9, 11-12. Nobel argues that the holding that an employer must prove attempted accommodation, or the unavailability of any accommodation without undue hardship, results in strict liability under Title VII. Pet. for Cert., p. 9. This argument is blurred with Nobel's contention that Court of Appeals imposed strict liability by ruling that Nobel's offer to settle Toledo's discrimination charge does not constitute an accommodation attempt. Later, in a different and unrelated section of its Petition for Certiorari, Nobel contends that the Court of Appeals' ruling conflicts with decisions from other circuits. Pet. for Cert., p. 16.

Nobel describes dire consequences that it asserts will follow from the burden of proof articulated by the Court of Appeals. Pet. for Cert., p. 8-9. However, Nobel's description reveals a fundamental misunderstanding of the decision of the Court of Appeals.

The Court of Appeals did not, as suggested by Nobel, Pet. for Cert., p. 9, require an employer to accommodate the religious practices of all prospective employees. Rather, the court asked only that the employer *attempt* to accommodate. In the present case, Nobel did not even consider attempting to accommodate Toledo's religious practices before refusing to hire him, let alone actually make an active attempt at accommodation.

Further, the Court of Appeals did not impose an absolute requirement that all employers must attempt to accommodate all religious practices of all employees. Rather, the court allowed an employer who makes no

effort to accommodate religious practices to escape liability if it shows that no accommodation could have been made without undue hardship. *Toledo*, 892 F.2d at 1490.

The Court of Appeals adopted this approach by accepting Nobel's argument that an employer should not be required to make futile attempts to accommodate religious practices, recognizing that there will arise rare cases in which a job is completely incompatible with a religious practice. *Toledo*, 892 F.2d at 1489-1490. Indeed, before the Court of Appeals Nobel endorsed the regulation of the Equal Employment Opportunity Commission, 29 C.F.R. §1605.2(c)(1), providing that an employer may justify a refusal to accommodate only by proving that undue hardship would result from each available alternative method of accommodation. Appellee/Cross-Appellant's Brief at 13-14. Nobel's position in the District Court on this issue was similar. "Nobel now claims that it did not need to make any effort to accommodate because any accommodation would have imposed undue hardship." *Toledo*, 651 F.Supp. at 488.

Thus, while Nobel complains of the analysis utilized by the Court of Appeals, that court simply adopted the approach that Nobel argued was appropriate. Toledo had argued that Nobel's evidence of undue hardship should not be considered because Nobel failed to make any attempt to accommodate Toledo's religious practices before refusing to hire him. The Court of Appeals explicitly rejected Toledo's position, *Toledo*, 892 F.2d at 1489-1490, and reviewed Nobel's evidence, 892 F.2d at 1490-1492. Nobel is dissatisfied, then, not with the method of analysis utilized by the Court of Appeals, but rather with the results of the application of this analysis to the facts of

this case. However, the District Court and Court of Appeals were of one mind on the proper resolution of these factual issues.

The District Court determined that Nobel could have hired Toledo without violating the regulations of the Department of Transportation, the terms of its own policies, or the terms of its lease with Ryder Truck Rental. *Toledo*, 651 F.Supp. at 489-491. The Court of Appeals ruled that these findings were not clearly erroneous. *Toledo*, 892 F.2d at 1490-1491.

The District Court determined that Nobel's hypothetical claim of increased tort liability that could result from hiring Toledo did not constitute an undue hardship. *Toledo*, 651 F.Supp. at 491. The Court of Appeals agreed that the hypothetical liability was too speculative to constitute undue hardship, and ruled that the District Court's findings were not clearly erroneous. *Toledo*, 892 F.2d at 1492.

The District Court found that any increased overtime costs that might result from accommodating Toledo's religious practices were *de minimis*, and that Nobel had not proven that accommodation would require alteration of Nobel's seniority system. *Toledo*, 651 F.Supp. at 491. The District Court's findings of fact were not challenged by Nobel before the Court of Appeals.

In sum, the Court of Appeals simply affirmed the District Court's factual finding that Nobel had failed to prove that it could not accommodate Toledo's religious practices without undue hardship. In doing so, the Court of Appeals did not create a strict liability standard, and

did not decide an issue of federal law of national importance. The factual rulings of the lower courts do not warrant review by this Court.

In a later portion of its Petition for Certiorari, Nobel asserts that there is a conflict between the decision of the Court of Appeals and decisions from the Sixth, Seventh, and Ninth Circuits. Pet. for Cert., p. 16, citing *Nottelson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981), *cert. den.* 454 U.S. 1046 (1981), *Anderson v. General Dynamics Convair Aerospace Div'n*, 589 F.2d 397 (9th Cir. 1978), *cert. den.* 442 U.S. 921 (1979), and *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978). Nobel argues that these decisions allow an employer to demonstrate undue hardship without having made an accommodation offer, and that this burden of proof conflicts with that articulated by the Court of Appeals.

Nobel does not allege a conflict arising from the specific holdings of these circuit courts, or from the principles underlying the holdings. Nobel asserts only that the description of the employer's burden of proof in these decisions differs from that set forth by the Court of Appeals in the present case. Such a conflict would not be of sufficient importance to require review by this Court. More importantly, the conflict perceived by Nobel does not exist.

In *Nottelson v. Smith Steel Workers*, 643 F.2d at 450, the Seventh Circuit stated that employers and unions must make a reasonable accommodation of an employee's religious practices or show that to do so would cause undue hardship. The court did not further discuss the burden of proof, and did not address the situation in which an

employer fails to make any attempt at all to accommodate. The Court of Appeals' holding that Nobel must prove either that it attempted to accommodate Toledo's religious practices, or that it could not offer any accommodation without undue hardship, does not conflict with the *Nottelson* holding. Both courts utilized a disjunctive test. Indeed, the burden of proof set forth by the Court of Appeals demands less of an employer than that set forth by the *Nottelson* court, since *Nottelson* required accommodation or a showing of undue hardship, while the Court of Appeals demanded only an attempt at accommodation or a showing of undue hardship.

The Ninth Circuit decision in *Anderson v. General Dynamics* required that the employer prove that it made a good faith effort to accommodate the employee's religious practices and, if those efforts failed, that it could not reasonably accommodate without undue hardship. 589 F.2d at 401; Pet. for Cert., p. 16. The Sixth Circuit in *McDaniel v. Essex Int'l, Inc.*, 571 F.2d at 341, like the court in *Nottelson*, held that the employer must prove that a reasonable accommodation was made, or that reasonable accommodation would work an undue hardship. However, the *McDaniel* court went on to observe that its prior decisions did not excuse an employer from making any effort to accommodate religious practices. 571 F.2d at 342.[2]

The decision of the Court of Appeals is consistent with both *Anderson* and *McDaniel*. Like the *Anderson* and

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[2] Oddly, Nobel cites *Anderson* and *McDaniel* as decisions that are both consistent with, and in conflict with, the *Nottelson* decision. Pet. for Cert., p. 16.

McDaniel courts, the Court of Appeals recognized an employer's duty to make an attempt to accommodate religious practices. However, the Court of Appeals imposed less of a burden upon employers than either the *Anderson* or *McDaniel* courts, since the Court of Appeals allowed an employer to forego any attempt at accommodation if the employer could prove that any accommodation would result in undue hardship. The *Anderson* and *McDaniel* courts did not include this alternative in their discussions.

In summary, the Court of Appeals utilized a burden of proof that is consistent in principle with that used by the *Anderson* and *McDaniel* courts to encourage an employer to actively engage in accommodation attempts, but that is also consistent in principle with that utilized by courts that seek to eliminate the need for futile accommodation efforts where no accommodation can be made without undue hardship. *Toledo*, 892 F.2d at 1489-1490. The Court of Appeals' decision is, as well, consistent with the burden of proof recited in *Nottelson*. Rather than conflict with the decisions from other circuits cited by Nobel, then, the decision of the Court of Appeals is in harmony with the language and concerns of these decisions.

Nobel also purports to see a conflict between the decision of the Court of Appeals and the decision of this Court in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). Pet. for Cert., p. 11. Nobel believes that the Court of Appeals defined the term "reasonable accommodation" as the solution proposed by the employee. In the present case, however, Toledo was never given an opportunity to present a solution to the conflict between his

religious practices and Nobel's employment needs. Rather, when Toledo asked Rodney Plagmann, the Nobel official who interviewed him for the position, if he could contest Nobel's refusal to hire him, he was told by Plagmann to "do what you have to do." The Court of Appeals could not have directed Nobel to accept Toledo's proposed solution because Nobel summarily refused to hire Toledo, without allowing him an opportunity to even make an accommodation proposal.

Similarly, Nobel asserts that the ruling of the Court of Appeals eliminates the "reasonableness inquiry" from refusal to hire cases, because it compels liability where the employer contends that no reasonable accommodation is possible. Pet. for Cert., p. 11. However, the question of reasonableness arises only in a determination of whether an employer's proposed action "reasonably accommodates" the prospective employee's religious activities. The reasonableness to be evaluated is the reasonableness of the employer's proposed accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. at 68-70.

It is apparent that the reasonableness of an employer's proposed accommodation cannot be evaluated when the employer did not propose an accommodation. Thus, it is not the ruling of the Court of Appeals that removed the "reasonableness inquiry" from the present litigation, but rather Nobel's failure to make any attempt to accommodate Toledo's religious practices before it flatly refused to hire him. Had Nobel made such an attempt at accommodation, the terms of that attempt would have received careful review by the District Court and Court of Appeals.

The analysis utilized by the Court of Appeals is consistent with decisions of this Court, decisions from other circuits, and Nobel's own position before the Court of Appeals. The application of this analysis to the facts of this case does not result in strict liability, and does not raise a significant federal issue warranting review by this Court.

III. THE COURT OF APPEALS' DECISION DOES NOT EXTINGUISH THE DUTY OF AN EMPLOYEE TO COOPERATE WITH ATTEMPTS AT REASONABLE COOPERATION.

The Court of Appeals quoted a portion of this Court's decision in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), finding that an employee has a duty to cooperate with an employer's attempt at accommodation of religious practices, and that the duty is triggered by the employer's initial efforts at accommodation. *Toledo*, 892 F.2d at 1488. The Court of Appeals ruled that Toledo did not breach the duty to cooperate because Nobel did not attempt to accommodate Toledo's religion before it refused to hire him. 892 F.2d at 1488-1489.

Nobel contends that the Court of Appeals' ruling undermines the policy considerations behind the conciliation process, creating an incentive for employees to file administrative discrimination charges and "wait in order to receive back pay without having to perform any work." Pet. for Cert., p. 12. Nobel's position disregards the statutory duty of victims of discrimination to mitigate their lost earnings. 42 U.S.C. §2000e-5(g); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231 (1982). An individual charging discrimination will forfeit the right to backpay if s/he

refuses a job substantially equivalent to the one that was denied by the employer. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. at 231-232.

Nobel also attempts to find a conflict between the Court of Appeals' decision and the decisions in *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. den.* 434 U.S. 1039 (1978), and *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141 (5th Cir. 1982). In fact, the Court of Appeals in the present case endorsed the *Brener* court's observation that the statutory duty to accommodate rests with the employer, and that the employee's duty to cooperate does not arise until the employer satisfies its initial burden. *Toledo*, 892 F.2d at 1488-1489, quoting from *Brener*, 671 F.2d at 146.

Brener and *Mann* both imposed a duty upon an employee to cooperate with an employer's attempts to accommodate the employee's religious practices. *Mann*, 561 F.2d at 1285; *Brener*, 892 F.2d at 146. In the present case, Toledo could not cooperate with Nobel because Nobel made no effort to accommodate Toledo's religious practices with which Toledo could cooperate. The Court of Appeals was, therefore, correct in ruling that Toledo did not breach a duty to cooperate, and this holding is consistent with the principles articulated by the *Brener* and *Mann* courts.

IV. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISION IN *TRANS WORLD AIRLINES, INC. V. HARDISON*

Nobel correctly notes that in *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977), this Court held that

undue hardship was demonstrated when Trans World Airlines showed that the employee's proposed accomodations would result in more than a *de minimis* cost to the company. The District Court cited *Hardison* and utilized its *de minimis* analysis in its ruling. *Toledo*, 651 F.Supp. at 491. The Court of Appeals did the same. *Toledo*, 892 F.2d at 1492.

Nonetheless, Nobel asserts that the Court of Appeals established a new "impossibility" test that greatly exceeds the *de minimis* standard articulated in *Hardison*. Pet. for Cert., p. 14. Similarly, Nobel contends that the Court of Appeals has required "an employer to prove the impossibility of the accommodation in order to establish undue hardship." Pet. for Cert., p. 16.

The Court of Appeals did no such thing. The Court of Appeals repeatedly utilized the concept of "undue hardship" in its analysis of the accommodation issue. *Toledo*, 892 F.2d at 1490, 1492. Indeed, Nobel's own quotations of the Court of Appeals demonstrate that that court was determining whether Nobel could have accommodated Toledo without undue hardship. Pet. for Cert., p. 13-14. As noted above, the Court of Appeals clearly understood that the term "undue hardship" requires an analysis of whether a burden is more than *de minimis*. *Toledo*, 892 F.2d at 1492.

It is apparent, then, that the Court of Appeals was not requiring that Nobel prove that accommodation of Toledo's religious practices was "impossible". Rather, both the Court of Appeals and the District Court engaged in a standard post-*Hardison* analysis of whether accommodation of Toledo's practices would result in more than

de minimis cost. *Toledo*, 892 F.2d at 1492; *Toledo*, 651 F.Supp. at 491.

In the Court of Appeals, Nobel argued that it could not have accommodated Toledo's religious practices without having incurred undue hardship. The Court of Appeals ruled that Nobel did not show that accommodation without undue hardship was impossible. *Toledo*, 892 F.2d at 1492. The Court of Appeals ruling does not, then, embody a new legal standard, but is simply an affirmance of the factual findings of the District Court that Nobel did not meet its burden of proof.

Nobel contends that the accommodation of Toledo's practices that was evaluated by the District Court and Court of Appeals was "proposed" by these two courts. Pet. for Cert., p. 14. In fact, this proposed accommodation was put forth by Nobel as part of its settlement offer to Toledo. The offer was not concocted by the lower courts.

Nobel asserts that the District Court erred in finding that two portions of this accommodation proposal would not create more than a *de minimis* cost. Specifically, Nobel asserts that the cost of replacing Toledo with another employee, should Toledo be unavailable for work because he had attended a Church ceremony the evening before a Sunday upon which work was required, and the disruption of the seniority system by such replacement, constitute more than *de minimis* costs. Pet. for Cert., p. 14-15.

The District Court noted that, given the fact that Toledo attends Church services just two to four times per year, and that Nobel needs Sunday drivers only about five times a year, it was unlikely that there would be a significant number of Sundays that both followed one of

Toledo's Saturday evening Church ceremonies and upon which Nobel required a driver. The District Court found that the payment of any overtime wages under such rare and occasional circumstances would be a *de minimis* cost. *Toledo*, 651 F.Supp. at 491. The District Court also found that Nobel did not prove that it could not replace Toledo without violating the seniority provisions of its contract with the union. *Id.*, 651 F.Supp. at 491.

Nobel did not challenge either of these findings as clearly erroneous in its appeal to the Court of Appeals. Such unchallenged findings do not warrant review by this Court.

Finally, Nobel describes as "speculation" the findings of fact of the District Court, and their affirmance by the Court of Appeals, concerning the hardship that Nobel asserted would result from the accommodation of Toledo's practices that Nobel proposed in its settlement offer. Pet. for Cert., p. 15. Of course, the District Court's findings of fact are not speculation, but a weighing of evidence proffered by the parties. The speculation in this litigation was undertaken not by the courts but by Nobel itself, in an attempt to justify its refusal to hire Toledo. *Toledo*, 892 F.2d at 1492 ("We are convinced that the risks of increased liability created by hiring Toledo are too speculative to qualify as undue hardship.").

Indeed, before this Court Nobel speculates that Toledo would not have accepted any restriction upon his religious practices even if Nobel had been willing to attempt accommodation of those practices. Pet. for Cert., p. 15. However, neither this Court nor the parties will ever know how Toledo would have responded to an

attempted accommodation when he applied for work because Nobel did not make any attempt at accommodation until the parties were adversaries before the New Mexico Human Rights Commission. Even then, Nobel's purported accommodation was part of an effort to obtain dismissal of Toledo's discrimination charge in its entirety.

The District Court and Court of Appeals applied the proper *de minimis* standard of "undue hardship" to the facts of this case, and reached conclusions that are not clearly erroneous. The conclusions of these courts are in accord with this Court's decision in *Trans World Airlines v. Hardison,* and do not raise important questions of federal law.

V. DRUG TESTING REGULATIONS CITED BY NOBEL DO NOT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS.

Nobel asserts that this Court should grant review because the ruling of the Court of Appeals is in conflict with regulations of the Department of Transportation, 53 Fed. Reg. 47134 (November 21, 1988). Pet. for Cert., p. 17. This regulation was not in effect at the time that Nobel refused to hire Toledo, and does not mandate testing for peyote. Further, Nobel did not argue the applicability of this regulation to the Court of Appeals.

Nobel refused to hire Toledo on March 18, 1984. The Department of Transportation regulations relied upon by Nobel were not promulgated until November 21, 1988. The new regulations had nothing to do with Nobel's refusal to hire Toledo, and can have no bearing upon the

Court of Appeals' ruling that this refusal to hire violated Title VII.

The Department of Transportation regulations cited by Nobel were published 13 months before the Court of Appeals' decision. Nonetheless, Nobel never brought the regulations to the attention of the Court of Appeals. The Rules of Appellate Procedure set forth a simple mechanism for doing so. Rule 28(j), F.R.A.P.

At any rate, the Department of Transportation regulations are a part of a Departmental program to prescribe testing for five drugs in a number of industries. 53 Fed. Reg. 47002 (November 21, 1988). Peyote is not one of the five drugs for which employees are to be tested. 53 Fed. Reg. at 47005 (to be codified at 49 C.F.R. §40.21(a)); 53 Fed. Reg. at 47148; 53 Fed. Reg. at 47151 (to be codified at 49 C.F.R. §391.81(b)). Additional testing requires further authorization, 53 Fed. Reg. at 47005 (to be codified at 49 C.F.R. §40.21(b),(c)); 53 Fed. Reg. at 47148. Such authorization has not been granted. Further, implementation of a portion of the drug testing regulations relied upon by Nobel has been preliminarily enjoined. *Owner-Operators Indep. Drivers Ass'n v. Burnley*, 705 F.Supp. 481 (N.D.Cal. 1989).

The Department of Transportation drug-testing regulations do not, then, affect or conflict with the holding of the Court of Appeals that Nobel violated Title VII when it refused to hire Toledo in 1984.

VI. THIS COURT'S DECISION IN *EMPLOYMENT DIV'N V. SMITH* DOES NOT AFFECT THE ANALYSIS OF THE DECISION OF THE COURT OF APPEALS.

In *Employment Div'n v. Smith*, ___ U.S. ___, No. 88-1213 (April 17, 1990), this Court ruled that religiously

inspired use of peyote, when illegal under state law, is not constitutionally protected. This ruling can have no impact upon the analysis utilized by the Court of Appeals.

The *Smith* decision concerned only the constitutional protection of religiously inspired conduct that was illegal under Oregon law. In contrast, Toledo's sacramental use of peyote was legal under New Mexico law, N.M.S.A. §30-31-6(D) (1978), and Colorado law, Colo.Rev.Stat. §12-22-317(3) (1985). *See Employment Div'n v. Smith*, slip op. at 30. Religious use of peyote is also legal under Navajo law. 17 Nav.Tr.Code §1201. Because Toledo's religious practices were legal under all relevant law, the First Amendment analysis in *Smith* is irrelevant.

In the *Toledo* opinion, the Court of Appeals noted this Court's grant of *certiorari* in *Smith*. *Toledo*, 892 F.2d at 1492 n.5. The Court of Appeals distinguished *Smith* from *Toledo* on the basis that *Toledo* involved Title VII, not the First Amendment, and that *Toledo* involved conduct that was legal under all relevant state laws. *Id.*

The Court of Appeals was clearly correct in distinguishing *Smith* from *Toledo*. Indeed, Nobel does not rely on, or even cite, the *Smith* litigation in its Petition for Certiorari. This Court's decision in *Smith* cannot affect the analysis in the Court of Appeals' ruling.

CONCLUSION

The decision of the Court of Appeals is based upon an unremarkable Title VII analysis that is consistent with

the decisions of this Court and the other circuits. The decision consists largely of an affirmance of the District Court's findings of fact; these facts are unlikely to recur. The Petition for a Writ of Certiorari should be denied, or the order below summarily affirmed on the merits pursuant to United States Supreme Court Rule 23.1.

Respectfully submitted,

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